IN THE

Supreme Court of the United States

October Term, 1941.

No.....

JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed in the record at pages 1944 to 1999.

II.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 21, 1941 [R. 1999-2000]. A petition for rehearing was duly filed and was denied by the Court on May 22, 1941 [R. 2000]. This Court has jurisdiction under the provisions of subdivision (a) of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. A. 347.

III.

Statement.

A full statement of the facts giving rise to the sole question here presented appears in the petition, and, in the interest of brevity, is not repeated here.

IV.

Specification of Error.

The Circuit Court of Appeals erred in holding that the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge, who had not seen the witnesses nor heard their testimony, but had merely read it, did not deprive petitioners of the right of trial by jury as guaranteed by Article III, Section 2, clause 3 of, and the Sixth Amendment to, the Constitution of the United States, or of due process of law as guaranteed by the Fifth Amendment.

V.

Argument.

The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

Due process of law in a criminal proceeding requires "a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty" (16 C. J. S., Constitutional Law, Sec. 579, p. 1171, and cases cited).

Article III, Section 2, clause 3 of, and the Sixth Amendment to, the Constitution of the United States guarantee to the accused in a criminal prosecution the right to a trial by an impartial jury.

This trial was a protracted one, during which the plaintiff called 127 witnesses [R. viii to xxv].

Judge Yankwich neither heard nor saw any of them. He merely read their testimony. He was not, therefore, in a position to pass upon the credibility of any of them.

Freeman v. U. S., 227 Fed. 732 at 756-59.

Judge Yankwich acknowledged his inability to advise the jury on the facts by instructing the jury as follows:

> "* * * The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case.
>
> However, it is not my custom to exercise this right nor shall I exercise it in the present case. You have heard the evidence and seen the witnesses. I have merely read the evidence * * *" [R. 1869-70].

A judge presiding over the trial of a criminal case before a jury, is not required, in all cases, to advise the jury on the facts. He must, however, be empowered to do so and must, in the exercise of a sound judicial discretion, determine whether the case is a proper one in which to so advise the jury, and must likewise be empowered

(except on acquittal) to set aside the verdict of the jury if, in his opinion, it is against the law or the evidence.

Patton v. U. S., 281 U. S. 276 at 289, 74 L. Ed. 854 at 858;

Capital Traction Co. v. Hof, 174 U. S. 2 at 13, 43 L. Ed. 873 at 877;

Galatas v. U. S. (C. C. A. 8), 80 F. (2d) 15 at 24, certiorari denied, 297 U. S. 711, 80 L. Ed. 998;

Hartzell v. U. S. (C. C. A. 8), 72 F. (2d) 569 at 586, certiorari denied, 293 U. S. 621, 79 L. Ed. 708;

U. S. v. Brown (C. C. A. 2), 79 F. (2d) 321 at 325;

Trefone v. U. S. (C. C. A. 10), 67 F. (2d) 954 at 955;

Lewin v. U. S. (C. C. A. 1), 62 F. (2d) 619 at 620;

Dillon v. U. S. (C. C. A. 2), 279 Fed. 639 at 643.

In these and many other cases this Court and the Circuit Courts of Appeals have held that a Federal Judge has the "right," "power" or "duty" to advise the jury on the facts. A judge has no "rights" in the proceedings, except the right to perform his duties. Therefore, to say that a Federal Judge has the "right" to advise the jury on the facts, is merely to say he has the authority and power, and that it is his duty, in the exercise of a sound judicial discretion, to do so.

How can a judge advise a jury on the facts, or determine whether or not he should do so when he does not

know *all* of the facts? In this case, while Judge Yankwich knew what the witnesses had said, he did not know how they had said it. The demeanor of a witness on the stand may be as important as any other evidence in the case.

> *Freeman v. U. S.* (C. C. A. 2), 227 Fed. 732 at 759.

It cannot be validly urged that, because the defendants did not call witnesses in support of their defense, it may be presumed that there was no conflict in the evidence. The question of whether there was such a conflict cannot be answered by a mere reading of the cold printed record, for there may be a conflict between the words used by a witness and his demeanor on the stand. His very manner and attitude may contradict and impeach his words.

If this were not the case, and if it could be presumed that there was no conflict in the evidence, petitioners would have been nevertheless entitled to a judge fully empowered to advise the jury on the facts. While a judge may not be *required* to advise the jury on the facts, he must be *empowered* so to do.

> *Patton v. U. S., supra;*
> *Capital Traction Co. v. Hof, supra.*

A judge of a Federal Court is not a mere moderator but is required to take an active part in the trial of a case in order to see that the truth is developed.

> *Herron v. So. Pac. Co.*, 283 U. S. 91 at 95, 75 L. Ed. 857 at 860;
> *U. S. v. Lee* (C. C. A. 7), 107 F. (2d) 522;
> *Quercia v. U. S.*, 289 U. S. 466 at 469, 77 L. Ed. 1321 at 1324.

Judge Yankwich was not empowered to perform either of these functions, and we submit that a trial in part presided over by a judge not empowered to perform *all* the duties of a judge,—not one of them, not most of them, but *all* of them,—is not a trial by a court "fully organized and competent for the transaction of business."

Patton v. U. S., supra;
Capital Traction Co. v. Hof, supra;
Herron v. So. Pac. Co., supra.

United States District Courts are the creatures of Statute, not the Constitution, and it is necessary to examine the statute to determine the powers of a substituted judge (*Patton v. United States, supra*). This subject is regulated by 28 U. S. C. A., Sec. 776, which provides in substance, that in case of the disability of the trial judge to hear and pass upon a motion for a new trial and allow and sign a bill of exceptions, his successor or any other qualified judge, shall do so, if the evidence was taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon said motion and allow a true bill of exceptions; but in case such judge is not so satisfied, he may in his discretion grant a new trial to the party moving therefor.

Prior to the enactment of this statute, and on December 4, 1899, this Court held in *Malony v. Adsit*, 175 U. S. 281 at 284, 44 L. Ed. 163 at 165, that "allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial," and this statute was passed to meet the situation thus presented. (See also *Norwood v. U. S.* (C. C. A. 4), 18 Fed. (2d) 577.)

The fact that this statute expressly empowers a substituted judge to pass upon a motion for a new trial and to settle a bill of exceptions but does not authorize him to perform any other function in connection with a criminal case which has been tried, or partially tried, evidences a clear Congressional intent to limit the powers of such substituted judge to those expressly conferred by this statute.

It required Congressional authority to empower a judge other than the one who sat at the trial to settle and allow a bill of exceptions, and this Court further held that no other judge could be so "empowered" by stipulation of the parties (*Malony v. Adsit,* 175 U. S. 281 at 287; 44 L. Ed. 163 at 166).

Since without Congressional authority a judge, other than the one who sat at the trial, may not by stipulation of the parties, be empowered to settle and allow a bill of exceptions in a civil case, it must necessarily follow that no judge other than the one who sat during the entire trial of a criminal case, may be empowered by stipulation of the parties to instruct the jury (a more important function) in the absence of any statute purporting to empower the judge so to do.

In considering the effect of the stipulation for the substitution of Judge Yankwich, we believe it only necessary to observe that if Judge Yankwich was empowered, by virtue of his commission as a United States District Judge and his designation and appointment to sit in the Western District of Washington [R. 1844-46], to perform all the duties of a trial judge in the instant case, no such stipulation was necessary and the substitution could have been made over the objection of the defend-

ants. If he was not so qualified, authorized and empowered, the stipulation did not, and could not, make him so.

This Court has held that a defendant may waive trial by jury (*Patton v. United States, supra*). But in this case, trial by jury was not waived. Nevertheless, the defendants did not have what this Court has defined trial by jury to be in *Patton v. United States* and *Capital Traction Co. v. Hof, supra,* because the trial was not by a jury "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

In *Freeman v. United States, supra,* the trial judge became incapacitated by illness after most of the evidence had been taken. Another judge was substituted, upon stipulation, and the trial proceeded, resulting in a conviction. The conviction was reversed on the ground that the instruction of the jury by a judge who had not heard the evidence but had merely read it, deprived the defendants of the right of trial by jury and denied to them due process of law. It is true that some of the *obiter dicta* contained in the opinion in that case is incompatible with the decision of this Court in the *Patton* case, but the *decision* in the *Freeman* case, and the reasons on which it was based, are entirely consistent, not only with the *Patton* case but with every other decision of this Court.

The *Patton* case does not hold that there may be a substitution of either jurors or judges in the course of the trial and it is difficult to conceive that it could be seriously contended that a juror who had not seen all of the witnesses and heard their testimony could be substituted for one who had originally sat.

The basis of the holding in the *Patton* case that a defendant in a criminal case might waive trial by jury and be tried before the Court was:

> "* * * There is no Act of Congress requiring that the trial of offenses shall be by jury and *a Court is fully organized and competent for the transaction of business without the presence of a jury.*" *

A Court is not, however, "fully organized and competent for the transaction of business" without the presence of a judge empowered to perform *all* the duties of a judge in the particular matter before him.

There is no distinction, according to the *Patton* case, in the "power" of a Federal Court to try a case by jury or before the Court without a jury, in the event that a defendant has consented to the latter mode of trial. It must necessarily follow that if the trial judge may be changed in the course of a jury trial, a like change may be made in the course of a trial before the Court without a jury and the guilt or innocence of the defendant be, therefore, determined by a substituted judge who had neither seen all or any of the witnesses nor heard all or any of their testimony. This, we submit, would be manifestly a denial of due process of law.

The trial court was not "fully organized and competent" for the transaction of the business of concluding the trial of this case because it was not presided over by a judge empowered to perform all the duties of a judge therein. There is no decision of this Court which holds

---

*The italics are those of this court and appear in 281 U. S. 276 at 299, 74 L. Ed. 854 at 864.

that a conviction had in a court which is not "fully organized and competent for the transaction of business" is not a nullity.

A defendant in a criminal case may not waive any step in the proceedings necessary to constitute due process of law. The Circuit Court of Appeals in this case used the following language:

> "Defendant urges, however, that he has not been accorded due process. As we have said above, the jurisdiction of the Court to try the case is subject to the controlling provisions of the Constitution. The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property, without due process of law. We take it that any waiver of the defendant would be ineffectual if it went so far as to deny him due process of law." [R. 1950.]

In *Hopt v. People of the Territory of Utah,* 110 U. S. 574 at 579, 28 L. Ed. 262 at 265, this Court held that a defendant in a criminal case could not waive the elimination of any step necessary to constitute due process of law.

For the foregoing reasons it is respectfully contended that a Writ of Certiorari should be granted and the judgments of conviction should be reversed.

MARK L. HERRON,
Attorney for Petitioners.